

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 23, 2012

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: FRED WEBER, INC.
TCEQ DOCKET NO. 2012-0648-AIR

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2012-0648-AIR

APPLICATION BY	§	BEFORE THE
FRED WEBER, INC.	§	TEXAS COMMISSION ON
FOR AIR QUALITY	§	ENVIRONMENTAL QUALITY
PERMIT NO. 94520L001	§	

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to hearing requests in the above-referenced matter.

I. Introduction

On January 4, 2011, Fred Weber, Inc. ("Applicant") applied to the TCEQ for proposed Air Quality Permit No. 94520L001. This permit would authorize the construction and operation of a rock crushing plant. The proposed site is located in Navarro County, at 7329 Southwest County Road 30, near Richland.

The application was declared administratively complete January 14, 2011. The first newspaper notice was published February 9, 2011 in the *Corsicana Daily Sun*, and February 24, 2011 in *La Prensa Comunidad*. The second newspaper notice was published November 13 and 15, 2011 in the same newspapers. The public comment period closed December 15, 2011. The TCEQ Executive Director's (ED) Response to Comments (RTC) was mailed February 21, 2012, and the deadline for hearing requests was March 22, 2012.

The TCEQ received timely hearing requests from the following people: Cynthia Gallegos; Ramon Mendoza; Patricia Odell; Margarita Patterson; George L. and Marjorie Procter-Smith; Margaret and Ronnie Reffitt; Consuelo R. Robles; Elvia, Marianella, and Nicanor A. Salas; Don and Doris Vaughan; and Bettie and William Williford.

For the reasons stated herein, OPIC recommends the Commission grant all of the hearing requests.

II. Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

Under 30 TAC § 55.203(a), an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

III. Analysis of Hearing Requests

A. Whether the requestors are affected persons

Cynthia Gallegos

According to the map prepared by ED staff, Cynthia Gallegos resides within one mile of the proposed plant site. She has lung problems and is concerned about air quality and respiratory infections. Given her proximity to the plant site and her concerns regarding air quality and health effects, Ms. Gallegos has a personal justiciable interest in this matter which is not common to the general public. Additionally, her stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. Therefore, OPIC finds that Cynthia Gallegos qualifies as an affected person.

Ramon Mendoza

The ED's map indicates that Ramon Mendoza resides within one mile of the plant site. He has eye problems and is concerned about air quality and his livestock. Given his proximity to the plant site and his concerns regarding air quality, health effects, and livestock, Mr. Mendoza has a personal justiciable interest in this matter which is not common to the general public. Further, his stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. Therefore, OPIC finds that Ramon Mendoza qualifies as an affected person.

Patricia Odell

According to the ED's map, Patricia Odell resides within one mile of the plant site. She is concerned about air quality. Given her proximity to the plant site and her concern regarding air quality, Ms. Odell has a personal justiciable interest in this matter which is not common to the general public. Also, her stated interest is protected by the law under which this application will be considered, and a reasonable relationship exists between that interest and the regulation of air emissions. Therefore, OPIC finds that Patricia Odell qualifies as an affected person.

Margarita Patterson

As indicated on the ED's map, Margarita Patterson resides within one mile of the proposed plant site. She has an organic garden and is concerned about air quality. Given her proximity to the proposed plant site and her concerns regarding air quality and property damage, Ms. Patterson has a personal justiciable interest in this matter which is not common to the general public. Additionally, her stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. We therefore find that Margarita Patterson qualifies as an affected person.

George L. and Marjorie Procter-Smith

The ED's map shows that George L. and Marjorie Procter-Smith reside within one mile of the plant site. They are concerned about air quality and their livestock. The Procter-Smiths also state that rock hauling trucks keep their gravel road in a constant state of disrepair. Given their proximity to the proposed plant and their concerns regarding air quality and livestock, the Procter-Smiths have a personal justiciable

interest in this matter which is not common to the general public. Further, their stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. For these reasons, we find that the Procter-Smiths qualify as affected persons.

Margaret and Ronnie Reffitt

According to the ED's map, Margaret and Ronnie Reffitt reside just over one mile from the proposed plant. They have lung, heart, and eye problems and are concerned about air quality. Given their proximity to the plant site and their concerns regarding air quality and health effects, the Reffitts have a personal justiciable interest in this matter which is not common to the general public. Also, their stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. Therefore, OPIC finds the Reffitts qualify as affected persons.

Consuelo R. Robles

According to the map prepared by ED staff, Consuelo R. Robles resides within one mile of the proposed plant site. She has heart problems and is concerned about air quality. Given her proximity to the plant site and her concerns regarding air quality and health effects, Ms. Robles has a personal justiciable interest in this matter which is not common to the general public. Additionally, her stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. We therefore find that Consuelo R. Robles qualifies as an affected person.

Elvia, Marianella, and Nicanor A. Salas

Elvia, Marianella, and Nicanor A. Salas each submitted an individual hearing request. However, all three requestors provided the same physical address, the same mailing address, and appear to be related family members. For purposes of this analysis, OPIC will group these requestors together.

The Salas requestors are all concerned about air quality. Elvia Salas has heart problems; Nicanor Salas has eye problems; and Marianella Salas is concerned about her organic vegetable gardens. The ED's map indicates the Salas requestors reside within one mile of the proposed plant. Given their proximity to the proposed plant site and their concerns regarding air quality, health effects, and property damage, all of the Salas requestors have a personal justiciable interest in this matter which is not common to the general public. Additionally, their stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. We therefore find that each of the Salas requestors qualifies as an affected person.

Don and Doris Vaughan

According to the ED's map, Don and Doris Vaughan reside within one mile of the proposed plant. They have lung, heart, and eye problems and are concerned about air quality and their livestock. Also, the Vaughans state that blasting shakes their house. Given their proximity to the plant site and their concerns regarding air quality, livestock, and health effects, the Vaughans have a personal justiciable interest in this matter which is not common to the general public. Also, their stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists

between those interests and the regulation of air emissions. Therefore, OPIC finds the Vaughans qualify as affected persons.

Bettie and William Williford

The ED's map shows that Bettie and William Williford reside within one mile of the proposed plant. They have lung, heart, and eye problems and are concerned about air quality and their livestock. Given their proximity to the plant site and their concerns regarding air quality, livestock, and health effects, the Willifords have a personal justiciable interest in this matter which is not common to the general public. Also, their stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. For these reasons, we find the Willifords qualify as affected persons.

B. Which issues raised in the hearing requests are disputed

All of the issues raised in the hearing requests are disputed.

C. Whether the dispute involves questions of fact or of law

All of the disputed issues involve questions of fact.

D. Whether the issues were raised during the public comment period

All of the issues were raised during the public comment period.

E. Whether the hearing requests are based on issues raised solely in a public comment which has been withdrawn

None of the hearing requests are based on issues raised solely in a public comment which has been withdrawn.

F. Whether the issues are relevant and material to the decision on the application

Air Quality

All of the hearing requestors have raised the issue of air quality. The purpose of the Texas Clean Air Act is to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants.¹ The issue of air quality is therefore relevant and material to the Commission's decision on this application.

Health Effects

Some of the requestors have raised the issue of human health effects resulting from or being exacerbated by the proposed air emissions. The Texas Clean Air Act is intended to protect public health and general welfare.² The issue of human health effects is therefore relevant and material to the Commission's decision on this application.

Property Damage

Some of the requestors are concerned about their organic gardens. This concern raises the issue of property damage, and the Texas Clean Air Act is intended to protect physical property.³ Therefore, the issue of property damage is relevant and material to the Commission's decision on this application.

¹ TEX. HEALTH & SAFETY CODE § 382.002.

² *Id.*

³ See TEX. HEALTH & SAFETY CODE §§ 382.002 and 382.0518.

Livestock

Some of the requestors are concerned about the welfare of livestock. Livestock may be considered property, and the Texas Clean Air Act states that one of the purposes of the Act is the protection of property.⁴ Therefore, the issue is relevant and material to the Commission's decision on this application.

Road Conditions

One of the hearing requests raises the issue of road conditions. However, under the Texas Clean Air Act, the TCEQ lacks jurisdiction to address road conditions which may result from traffic on public roads. Therefore, this issue is not relevant and material to the Commission's decision.

Blasting

One of the hearing requests raises the issue of blasting at the site. The requestors state that blasting shakes their house. The TCEQ regulates air emissions, and while a quarry can produce air emissions, the noise or vibration caused by quarry blasting is not considered an air emission and is not regulated by the TCEQ. As a result, this issue is not relevant and material to the Commission's decision.

G. Maximum expected duration for the contested case hearing

For the contested case hearing, OPIC estimates a maximum duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

⁴ TEX. HEALTH & SAFETY CODE § 382.002.

IV. Conclusion

OPIC finds that all of the hearing requestors qualify as affected persons. We also find that all of the requestors have raised disputed issues of fact that are relevant and material to the Commission's decision on this application. Therefore, OPIC respectfully recommends the Commission grant all of the hearing requests.

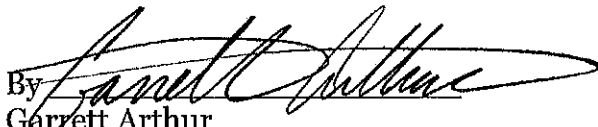
OPIC further recommends that the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

1. Whether the proposed plant will adversely impact air quality?
2. Whether the proposed plant will adversely impact public health?
3. Whether the proposed plant will adversely impact physical property, including organic gardens?
4. Whether the proposed plant will adversely impact livestock?

For the contested case hearing, OPIC recommends a duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2012, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Garrett Arthur

**MAILING LIST
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TCEQ DOCKET NO. 2012-0648-AIR**

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REQUESTERS:

See attached list.

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